

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ESTATE OF MARIE TOMEI, et al.	:	
Plaintiff,	:	Civil Action
	:	No. 2:19-03000 (CFK)
v.	:	
	:	
THOMAS R. TOMEI, et al.,	:	
Defendants.	:	

**MOTION OF DEFENDANTS, THOMAS R. TOMEI AND H&H MANUFACTURING
CO., INC. TO DISMISS PLAINTIFF’S COMPLAINT FOR LACK OF SUBJECT
MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED PURSUANT TO RULE 12(B)**

Defendants, Thomas R. Tomei and H&H Manufacturing Co., Inc. (H&H) hereby move the Court to dismiss the Complaint of Plaintiff, Estate of Marie Tomei, deceased by the Executor and Guardian Mark Tomei and Executor Ad Litem James Flandreau, for lack of subject matter jurisdiction and failure to state a claim, and in support thereof avers as follows:

1. This action was initiated by Plaintiff, Estate of Marie Tomei, deceased by the Executor and Guardian Mark Tomei and Executor Ad Litem James Flandreau, (the “Estate”) derivatively as an alleged shareholder of H&H seeking injunctive relief and asserting a claim for breach of fiduciary duty. (See Complaint at ¶¶23-27, 28-39, attached hereto as Exhibit “A”).

2. Plaintiff, Estate, alleges it was raised in the State of Florida and is a citizen of Florida. (See Exhibit “A” at ¶¶1&5).

3. Plaintiff, Estate, also alleges that it is acting by and through an Executor Ad Litem, James Flandreau, Esquire, with an address located at 320 W. Front Street, Media, Delaware County, Pennsylvania 19063. (See Exhibit “A” at ¶1).

4. Defendant, Thomas Tomei, is incorrectly alleged to be a citizen of New Jersey with a residential address in New Jersey. (See Exhibit “A” at ¶2).

5. Thomas Tomei maintains a primary residential address, at 100 S. Birch Rd. Jackson Tower #2606 Ft. Lauderdale, FL 33316, and is therefore domiciled in Florida, and a citizen of Florida.

6. Defendant, H&H Manufacturing Co., Inc., is alleged to be a citizen of Pennsylvania with its principal place of business located at 2 Horne Drive, Folcroft, PA 19032. (See Exhibit “A” at ¶3).

7. The Complaint asserts that venue is proper in this Court, alleging that “[v]enue is proper in the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1391 because all Defendants reside within the Eastern District of Pennsylvania.” (See Exhibit “A” at ¶6).

8. Plaintiff’s boiler plate assertion in support of its rationale for venue in the Eastern District of Pennsylvania, is untrue on its face, as the facts pled in the Complaint indicate and confirm that the named parties do not all reside within the Eastern District of Pennsylvania.

9. Furthermore, Plaintiff, James Flandreau, lacks standing as an executor ad litem.

10. The Order granting James Flandreau authority to act as executor ad litem was issued by the Delaware County Court of Common Pleas on May 12, 2017 and specifically states that James Flandreau’s authority to act as executor ad litem is strictly limited to that litigation (H&H v. Tomei; docket no. 2013-05775)(“The fees to be paid to Mr. Flandreau will be the responsibility of the Estate of Marie Tomei, and Mr. Flandreau’s duties shall be limited to his role as Executor Ad Litem in this case only.”). See, May 12, 2017 Order of Court attached hereto as Exhibit “B.” Defendants request the Court take judicial notice of the May 12, 2017 Order.

11. Accordingly, James Flandreau is not authorized to act on behalf of the estate in this matter and fails to state a claim upon which relief can be granted.

12. Furthermore, Plaintiff's diversity jurisdiction allegations fail because the Plaintiff improperly excludes James Flandreau, the alleged executor ad litem, with an address in the Commonwealth of Pennsylvania, even though he is listed as a party to the action and it appears his participation is a basis for the assertion that venue is proper in the Eastern District of Pennsylvania.

13. Because Plaintiff, James Flandreau, executor ad litem, is alleged to be located in Pennsylvania and Defendant H&H is alleged to have its principal place of business in Pennsylvania, there is no diversity jurisdiction.

14. Plaintiff's diversity jurisdiction allegations also fails because Plaintiff fails to indicate Thomas Tomei's domicile pursuant to 28 U.S.C. § 1332(a).

15. As is well known to Plaintiff (by and through the executor, Thomas Tomei's brother Mark Tomei), Thomas Tomei maintains a primary residential address, at 100 S. Birch Rd. Jackson Tower #2606 Ft. Lauderdale, FL 33316, and is therefore domiciled in Florida, and a citizen of Florida.

16. Thomas Tomei is domiciled in Florida even though he may own residential properties in New Jersey. *Strabala v. Zhang*, 318 F.R.D. 81, 97 (Ill. N.D. 2016) (“[A] person can have multiple residences but only one domicile. ‘The very meaning of domicil [sic] is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. In its nature it is one[.]’” (quoting *Williamson v. Osenton*, 232 U.S. 619, 34 S. Ct. 442, 58 L. Ed. 758 (1914))).

17. Likewise, Plaintiff, Estate, is alleged to be a Florida estate that is a citizen of Florida pursuant to 28 U.S.C. 1332.

18. Because Thomas Tomei and the estate are both domiciled in Florida there is no diversity jurisdiction.

19. Thus, this court lacks subject matter jurisdiction as there is no diversity among the parties. (See Exhibit "A" at ¶¶1-6).

20. For the foregoing reasons, as well as those stated in the accompanying Memorandum of Law, Defendants, Thomas R. Tomei and, nominally, H&H requests the Court dismiss this action pursuant to Rule 12(b)(1) and 28 U.S.C. § 1332.

WHEREFORE, Defendant, Thomas R. Tomei and H&H, requests the Court to: enter the attached proposed order dismissing Plaintiff's Complaint and claims against it without prejudice to being re-filed in the appropriate state court with jurisdiction.

Respectfully,

/s/ Lars J. Lederer

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Dated: September 6, 2019